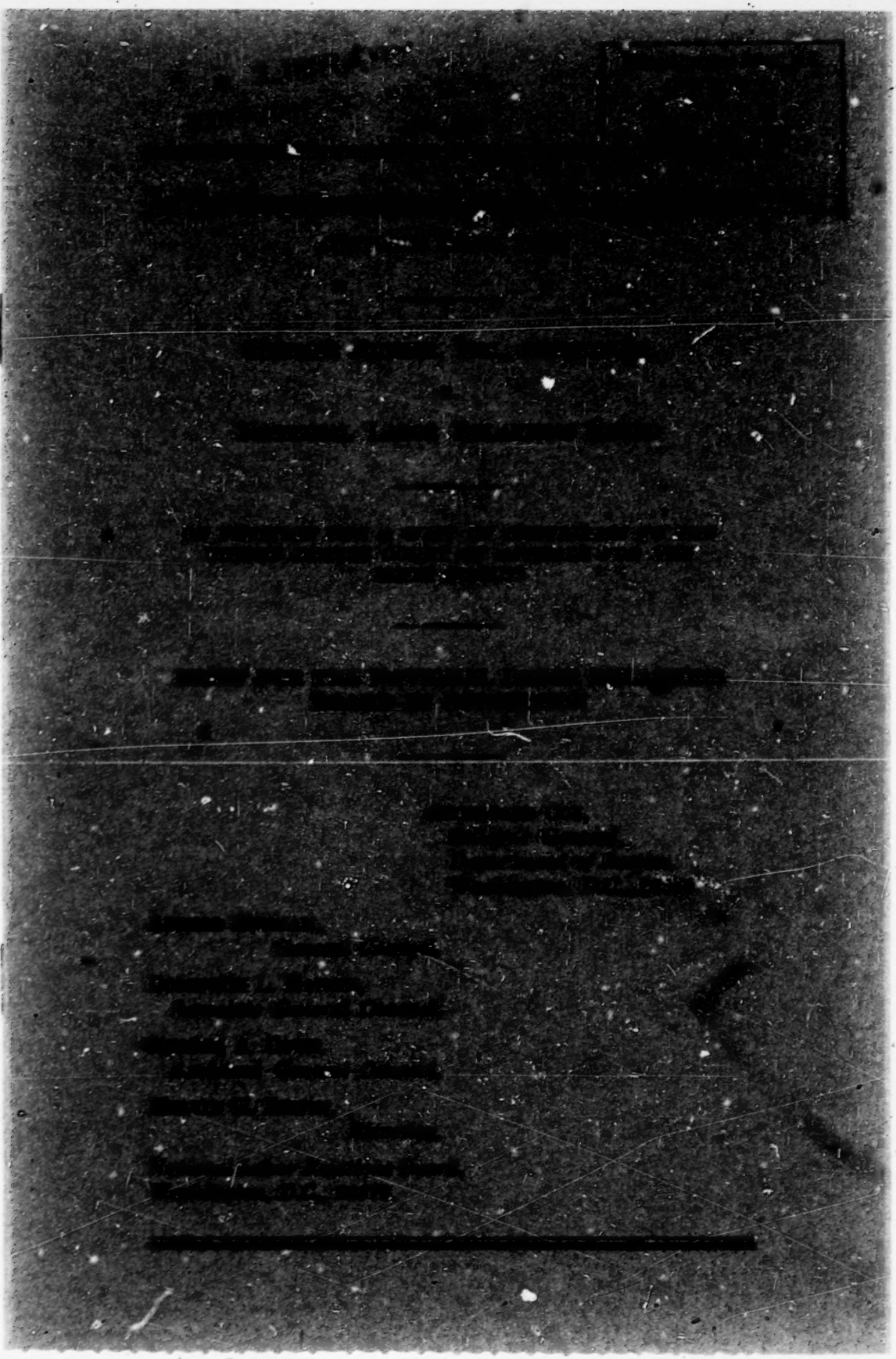

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 979

KEENER RUBBER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 31-34) is reported at 326 F. 2d 968. The Board's decision and order (P.A. 148a, 144a-147a)[1] are reported at 142 NLRB No. 102.

JURISDICTION

The opinion and judgment of the court of appeals were entered on January 27, 1964 (Pet. 31, 35), and

[1] "P.A." refers to petitioner's appendix in the court below.

a petition for rehearing was denied on March 2, 1964 (Pet. 35). The petition for a writ of certiorari was filed on April 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that employee William Mowen was a supervisor within the meaning of Section 2(11) of the National Labor Relations Act.

STATUTE INVOLVED

Section 2(11) of the National Labor Relations Act, 61 Stat. 137, 29 U.S.C. 152(11), provides:

> (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In an election conducted by the Board at the Company's rubber band factory, a ballot, that would have been determinative if cast against the Union, was cast by William Mowen, was challenged by the Union on the ground that Mowen was a supervisor as

defined by Section 2(11) of the Act, and thus ineligible to vote (P.A. 6a, 8a). The facts concerning Mowen's supervisory status are as follows:

In the mill room of the Company's plant, crude rubber is converted into tubing (P.A. 116; 95a). The cold rubber stock is fed into a mill, warmed up, and sliced off by the "warm up man" (P.A. 55a, 80a). After the rubber slabs are fed into the "tuber" machine, the product is handled by a "poler," who inserts a pole into the tubing and hangs it on a rack (P.A. 55a, 56a, 80a-81a). The product is vulcanized, and then sent to the band room for cutting and packaging (P.A. 81a-82a). Eleven employees operate the mill room on the first shift, between 6:30 a.m. and 2:30 p.m., and ten employees work on the second shift, from 2:30 to 10:30 p.m. (P.A. 116a-117a; 80a, 88a). The general foreman of the mill room is Spencer Bedford, who directly supervises the mill room employees on the first shift (P.A. 117a; 80a, 89a, 95a, 21a). Bedford, who lives 5½ miles from the plant, returns there from two to five times per week during the second shift, for periods ranging from ten minutes to two hours (P.A. 121a; 82a-88a).

In the spring of 1960, Mowen, Jack Hammel, and a third employee were alternately rotated from their regular first shift mill room assignments to the second shift, to enable the management to determine which of them would be selected as the supervisor of this shift (P.A. 117a; 86a, 16a-17a). On June 6, Jack Hammel was placed in charge of the second shift (P.A. 117a; 96a, 115a). Hammel, although now foreman,

continued working as a "poler," the same production job which he held prior to his promotion, at a rate of $2.26 per hour (P.A. 118a; 98a). On August 29, when an employee complained of Hammel's conduct toward her, Company President Miller stated that "Bill Mowen would take over the foreman's job" (P.A. 118a; 22a-23a, 25a).

Hammel was removed from his position that day and reassigned to the first shift, while Mowen, who had already put in his regular eight hours as a poler on the first shift, took Hammel's place on the second shift and worked an additional eight hours (P.A. 118a; 105a, 93a-94a, 97a-98a, 17a, 23a-24a). Thereafter, Mowen worked as a poler on the second shift on the same machine that Hammel had operated while a supervisor (P.A. 118a, 123a; 108a, 26a, 27a). Mowen's pay was raised from $2.08 to $2.26 per hour, the same sum Hammel had received as a supervisor-poler on the second shift (P.A. 117a, 122a, 123a; 56a, 98a). Mowen worked as a poler for at least a week, and subsequently transferred to work as a "warm-up man" on the same shift (P.A. 123a, 55a, 26a, 27a).

In addition to operating the "warm-up mill" machine, Mowen issued instructions, assignments, and orders to the other employees on the second shift, all of whom were less experienced than the employees on the first shift (P.A. 117a, 123a; 55a, 65a-66a, 70a, 79a-80a). As one employee stated, in explaining that he understood Mowen to be foreman on the second shift, "He told us what to do and told me not to do certain things" (P.A. 119a; 43a). Thus Mowen in-

structed the employees when and where to take their rest breaks (P.A. 40a). When the men who operated the vulcanizer hit slack periods, Mowen directed them to perform other tasks (P.A. 40a, 43a). When an employee wanted to use the plant telephone, he asked Mowen for permission; Mowen could also grant permission to leave the plant in the event of illness or when an emergency arose at home (P.A. 119a; 40a-41a, 43a, 44a, 62a, 68a). He insured that rubber was unloaded from trucks by the proper employees, and also called workers at their homes when they were needed to work overtime (P.A. 119a; 52a, 43a, 18a, 63a, 85a). In addition, Mowen reported on the shortcomings and derelictions of the second shift employees to General Foreman Bedford and President Miller (P.A. 63a, 68a, 107a). For approximately 75 percent of the time on the second shift, Mowen was the only person present in the plant with any authority over the ten employees on that shift (P.A. 123a).

B. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found that, although Mowen did not possess the authority to hire, fire, promote, or discharge employees, he nevertheless "responsibly directs in a non-routine manner the employees on the second shift" (P.A. 122a-123a, 126a). The Board accordingly concluded that he was a supervisor within the meaning of Section 2(11) of the Act, sustained the challenge to his ballot, and certified the Union as the representative of the Company's employees (P.A. 126a).

Lodge 2222, International Association of Machinists.

The Union then requested the Company to meet and bargain with it, but the Company refused, contending that the Board's certification of the Union was erroneous (P.A. 132a). The Board found that the Company thereby violated Section 8(a)(5) and (1) of the Act, and entered an order requiring it to cease and desist from the unfair labor practice found and, upon request, to bargain collectively with the Union (P.A. 148a, 145a-146a).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals upheld the Board's finding that Mowen was a supervisor within the meaning of Section 2(11) of the Act and enforced the Board's order in full (Pet. 31-34).

ARGUMENT

1. As petitioner acknowledges (Pet. 7), the petition presents only the "narrow issue" whether employee Mowen had authority "responsibly to direct other employees in a way not of a merely routine or clerical nature but requiring the use of independent judgment." This issue, which involves primarily the sufficiency of the evidence supporting the Board's findings in this particular case, does not warrant fur-

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[1] Since Section 2(11) of the Act (*supra*, p. 2) defines "supervisor" as someone who has the authority either to hire and fire employees "or responsibly to direct them," an individual with the latter authority may be a supervisor even though he does not possess authority to hire or fire. *National Labor Relations Board* v. *Budd Manufacturing Co.*, 169 F. 2d 571, 576 (C.A. 6), certiorari denied, 335 U.S. 908.

ther review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, there is ample support for the Board's findings. As shown pp. 4-5, *supra*, Mowen exercises independent judgment in assigning employees various tasks during slack periods, instructing them when and where to take rest breaks, granting them permission to leave the plant in the event of illness or emergencies, and insuring that they properly perform their assigned tasks. Moreover, as the court below pointed out, the second shift "employees looked upon Mowen as the foreman from whom they received orders, instructions and directions" (Pet. 34). Finally, as the court noted (Pet. 34), if Mowen did not have authority responsibly to direct the employees and to make independent judgments, the second shift workers, all of whom had less experience than their counterparts on the first shift who worked under constant supervision, would be left without direct supervision more than 75 per cent of the time. In these circumstances, the Board was warranted in concluding that Mowen was no mere leadman or straw boss but possessed sufficient authority over the second shift to be a supervisor within the meaning of Section 2(11) of the Act. See

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[1] General Foreman Bedford, who lives more than five miles from the plant, returns there from two to five times per week during the second shift for periods ranging from ten minutes to two hours (p. 3, *supra*). President Miller is also present in the plant during the first two and one-half hours of the second shift, and comes in occasionally during the evening, but Bedford testified that, except during those occasions when he (Bedford) came in at night, the second shift employees had no supervision (P.A. 88a).

National Labor Relations Board v. *Swift and Company*, 292 F. 2d 561, 563 (C.A. 1).

2. Contrary to petitioner's assertion (Pet. 11-20), there is no conflict of decisions. The cases cited by petitioner, in which different courts of appeals reached varying conclusions on whether particular employees were supervisors, all turn on their particular facts, and therefore are not inconsistent with the holding below that substantial evidence supports the Board's finding that employee Mowen was a supervisor.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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